



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW NUMBER 18 OF 2016

SIMON KAMAU & 19 OTHERS.....APPLICANTS

VERSUS

DIRECTOR OF PENSIONS1ST RESPONDENT

TEACHERS SERVICE COMMISSION.....2ND RESPONDENT

RULING

1. On the 15th August 2016, all the parties to this Judicial Review application represented by their Advocates recorded a consent order that would have had the Kshs.1.5Billion paid out to the pensioners in installments starting with those who retired in 2007 onwards and teachers entitled to the enhanced pension as ordered by various courts. The Director of Pensions Mr. Shem Nyakutu undertook to effect the payments within thirty(30) days and report back to court on the progress on the 16th September 2016. He failed to attend and his counsel could not explain to the court what progress if had been made towards the payments. None of the retired teachers had been paid. For the year 1997 pensioners, it was stated that they all had a NIL payment. This information was not communicated to the Teachers Service Commission (TSC) or Advocate for the retired teachers.

2. Teachers Service Commission(TSC) has processed over three thousand(3000) claims but as at today, the Director of Pensions has confirmed having collected only five hundred and thirteen(513) out of these, it is his statement on Oath that four hundred(400) were found to have a NIL payment and that one hundred(100) claims have been paid through Central Bank to the claimants. Characteristically he brought no such evidence to court. The court was not given the names of the 400 rejected claims on NIL payment. The Advocates have not been given any communication to that effect nor reasons for the NIL payment.

I believe these reasons are important and that claimants, their Advocate and Teachers Service Commission ought to be advised.

3. I have heard the Advocates Submissions and Mr. Nyakutu's responses. He stated that on the 16th September 2016 he was unwell but did not send his counsel, Mr. Wachira Ngunyo to inform the court. Indeed Mr. Ngunyo had no idea why the Director failed to attend court despite having spoken to him the previous day, and urged him to attend court.

As that was not enough, the Director came to court with nothing to confirm any single payment to the retirees, or reasons why the Directors office could not pay. He blamed the Controller of Budgets one Ms. Agnes Odhiambo who he stated is frustrating the payment process as she says that she has to approve all the payments. Out of the claims sent for approval, it was stated that she has approved only 130 claims

and which the Director of Pensions says he has paid and as I have stated, there is no evidence of any such payment. On this the Director claims that Central Bank of Kenya has been instructed and has issued EFT instructions on payment.

Again, the Director has only brought to court twenty five (25) of such Electronic Funds Transfer (EFT) instructions. Mr. Kimatta for the retirees submitted that as at this morning, none of the claimants had received any payment and none was credited to their accounts.

4. Mr. Nyakutu has owned up that out of the one thousand three hundred and eighty-four(1384) claims processed by Teachers Service Commission, he has only collected five hundred and thirteen(513) out of which he has paid one hundred only. He further states that he has a shortage of staff in his department. He could not explain what his office has been doing for two months since the orders were issued

He seeks that summons be issued to the Controller of Budgets to shed light to the Court why the delay in the approval of the claims and why she has to approve, a judgment ordered by the court.

5. All parties agree that the pace taken by the Director of Pensions is unsustainable and that the Pensions Department is not serious at all, that the Director himself has no regard for court orders and takes them casually.

It is important that parties despite their status in office or in society must take serious considerations of court orders and act on them and if there are roadblocks, it is their duty to go back to court and explain the difficulties. Failure to do so is contemptuous of court orders and in effect lowering the dignity and authority of the court. The court should never be seen as a harmless dog that only barks and cannot bite. There is punishment for contempt. If one is found guilty of contempt of court orders, he must be so cited and accordingly punished.

See **R -vs- Kenya School or Law & Others (2015) e KLR** *Exparte Juliet Wanjiri Njoroge* where no compelling reasons were advanced and punishment was meted.

Also See **TSC -vs- KNUT 196 of 2015**. Monetary punishment was given to the contempnors.

6. I have considered all the submissions and Mr. Nyakutu's (Director of Pensions) defence as it were.

I am not satisfied that any reasonable reasons have been given for failure to obey the court orders – both in the court attendance and in the payments of the retired teachers. I have read and considered his affidavit sworn on the 5th October 2015 and filed today, the 6th October 2016, and served upon the other parties today in court. This is not procedural.

7. In the circumstances, I make the following orders and directions:

1. That all correspondence, payments, rejection of payments (NIL payments) by the Director of Pensions be henceforth communicated to the claimants Advocates and Teachers Services Commission Advocates.

2. That for every week from the date of this order, the Director of Pensions is directed to make payments not less than 300 claims as he stated if approved he could pay 100 claims in a day.

3. That the Director of Pensions is directed to collect the balance of the 3184 claims so far processed by Teachers Service Commission by the 10th October 2016 and deal with them in accordance with No. 2 above.

4. That the Controller of Budgets one Ms. Agnes Odhiambo is summoned to come to court on the 25th October 2016 to shed light and explain why she has been frustrating the retired teachers payments process.

5. That for the blatant disobedience and obvious willful contempt of court orders by the Director of Pensions I impose a fine of Kshs.200,000/= to be paid by the Director of Pensions, Mr. Shem Nyakutu personally within a period of seven(7) days failing which he shall be arrested and committed to a one(1)month civil jail at Kamiti Maximum Prison, without further recourse to court. The Officer Commanding Police Station (OCS), Central Police Station, Nairobi to enforce the order of arrest, if there is default.

6. That there will be a mention on the 25th October 2016 to confirm progress of the payments.

It is so ordered.

Dated, signed and delivered in open court this 6th Day of October 2016

JANET MULWA

JUDGE